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No. 07-946

FILED
MAR 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CalPERS)

Petitioner,

v.

NEW YORK STOCK EXCHANGE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The New York Stock Exchange's ("NYSE") opposition to the Petition for a Writ of Certiorari seems to have two major themes: First, that Petitioner failed to make its position known below, and second, that the NYSE was not really engaged in any *active* wrongdoing with its Specialists. Neither theme rings true.

The NYSE repeatedly states that Petitioner failed to cite specific cases, or to make arguments below, concerning the availability of absolute immunity to a private non-governmental organization such as the NYSE. The NYSE asserts, for example, that "Petitioner attempts to create a conflict between the Second Circuit's decision and several different lines

of this Court's precedent," but that "Petitioner never raised any of these arguments below." NYSE Opposition to Petition for Writ of Certiorari ("NYSE Opposition") at 17.

In truth, Petitioner's Opening Brief ("Second Circuit Opening Brief") before the Second Circuit emphasized this Court's holdings that those claiming the immunity bear the burden of proving that public policy requires such broad protection of their actions. Second Circuit Opening Brief at 22-23. It cited this Court's decision in *Butz v. Economou*, 438 U.S. 478, 507 (1978), as limiting immunity "'to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business,'" and this Court's decision in *Richardson v. McKnight*, 521 U.S. 399, 412 (1997), as denying immunity to *private* prison guards because those "'who seek exemption from personal liability have the burden of showing that such an exemption is justified.'" Second Circuit Opening Brief at 22-23 (quoting *Butz* and *Richardson*).

The argument in Petitioner's Opening Brief before the Second Circuit began by noting that

> the Supreme Court has displayed a reluctance to extend broad immunity to private actors performing public functions. *See Richardson*, 521 U.S. 399 (no qualified immunity for prison guards where state delegates the public function of operating prisons to private firms). And absolute immunity can legitimately apply only in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz*, 438 U.S. at 507.

Second Circuit Opening Brief at 24.

Petitioner's Reply Brief before the Second Circuit ("Second Circuit Reply Brief") similarly emphasized this Court's precedents limiting the availability of immunity:

> The NYSE contends that as a nongovernmental private entity to which some quasi-governmental functions have been delegated, it must be entitled to the same broad governmental immunity that would be accorded a genuine government actor. Yet the Supreme Court has rejected that viewpoint, holding in *Richardson v. McKnight*, 521 U.S. 399 (1997), that even if prison officials ordinarily are entitled to qualified immunity as government actors, *see Procunier v. Navarette*, 434 U.S. 555 (1978), when the manifestly public function of operating prisons is delegated to private companies, the immunity *vanishes*.

Second Circuit Reply Brief at 2-3.

This is the very same argument advanced now in the Petition for Certiorari, with citations to many of the same authorities that Petitioner cited below.[1] The NYSE is entitled to oppose Petitioner's contentions "that *Richardson* stands for the broad proposition that immunity 'vanishes' when a private actor is involved." NYSE Opposition at 25 (quoting Petition for a Writ of Certiorari at 20). But it cannot

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[1] *Compare, e.g.*, Petition for Certiorari at 20 & n.13 (citing *Richardson*, 521 U.S. at 401; *Ace Beverage Co. v. Lockheed Info. Mgmt. Servs.*, 144 F.3d 1218, 1219-20 (9th Cir. 1998); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1006-10 (N.D. Cal. 2006), *appeal pending*, 9th Cir. Nos. 06-17132, 06-17137)), *with* Second Circuit Reply Brief at 2-3 & n.1 (similarly citing *Richardson*, *Ace Beverage*, and *Hepting* for the same points).

legitimately pretend that Petitioner never argued the point below.

Petitioner explained below, as in its Petition before this Court, that *Richardson* itself emphasized

> that the need for governmental immunities is reduced when public functions are delegated to private companies competing in the marketplace, where they are "subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments."

Second Circuit Reply Brief at 3 (quoting *Richardson*, 521 U.S. at 409, 412).

"The NYSE is such an entity," Petitioner argued below, as it does now before this Court, noting that the NYSE "currently is a for-profit company competing with other organizations—such as the American Stock Exchange and NASDAQ—to provide a market for securities; and though nominally a non-profit corporation during the Class Period, it was planning to reorganize and operate as a for-profit company." *Compare* Second Circuit Reply Brief at 3 n.2 (citing Second Circuit Opening Brief at 10 n.5), *with* Petition for a Writ of Certiorari at 22.

Petitioner's Reply Brief before the Second Circuit also argued that the "availability of *absolute* immunity, at issue in this appeal, is even more narrowly constrained than is the mere *qualified immunity* with which *Richardson* dealt," Second Circuit Reply Brief at 3 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)), insisting again that "[a]bsolute immunity is, indeed, limited 'to those exceptional situations where

it is demonstrated that absolute immunity is essential for the conduct of the public business.'" Second Circuit Reply Brief at 2-3 (quoting *Butz*, 438 U.S. at 507).

Nor is there any merit to the NYSE's suggestion that it is improper for Petitioner to cite authorities before this Court that were not specifically cited below. In *Elder v. Holloway*, 510 U.S. 510, 512 (1994), this Court held that appellate review "is to be conducted in light of all relevant precedents," and not just those cited in the lower courts. This Court cited with approval Judge Kozinski's dissent from denial of en banc rehearing in that case, which had emphasized that "with questions of law, we deem the matter fairly raised if the issue is presented to the district court; citation to a particular case has never been seen as part and parcel of fairly raising the issue below." *Elder v. Holloway*, 984 F.2d 991, 999 (9th Cir. 1993) (Kozinski, J., dissenting from denial of en banc rehearing).

As a matter of fact, this Court's precedents permit a party even to raise *new arguments* in favor of the position it advanced below.[2] In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), for example, the petitioner had argued below "that Amtrak's actions were subject to constitutional

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[2] *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where general issue was raised below, Court rejects respondent's contention "that petitioner's failure to make this exact argument below precludes its assertion here"); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (having asserted a claim below, petitioners "could have formulated any argument they liked in support of that claim here"); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.").

requirements because Amtrak, *although a private entity*, was closely connected with federal entities." *Id.* at 378-79. Only following a grant of certiorari had he "first explicitly presented—in his brief on the merits—the alternative argument that Amtrak was itself a federal entity." *Id.* at 379. This Court applied its "traditional rule," that in proceedings before this Court, "'parties are not limited to the precise arguments they made below.'" *Id.* (quoting *Yee*, 503 U.S. at 534).

The Second Circuit panel below was bound, unless that court chose to convene en banc, by the existing Second Circuit precedents recognizing absolute immunity for SROs and their employees, including *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93 (2d Cir. 2001); *DL Capital Group, LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93 (2d Cir. 2005); *MFS Sec. Corp. v. N.Y. Stock Exch., Inc.*, 277 F.3d 613 (2d Cir. 2002); *Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49 (2d Cir. 1996). One cannot expect Petitioner to argue its position before a Second Circuit panel, bound by these decisions as controlling precedents, as it would before this Court, which is not similarly bound. There is no basis for the NYSE's suggestion that arguments must be advanced in identical fashion before both courts.

Neither is there any basis for its suggestion that determination of the issue presented should turn on whether Petitioner named individual employees as defendants in addition to the NYSE itself—for the Second Circuit has rejected any distinction. *See, e.g.*, *D'Alessio*, 258 F.3d at 106 (holding that "the NYSE *and its various officers* were entitled to absolute immunity") (emphasis added); *DL Capital*, 409 F.3d

at 97 ("an SRO and its officers are entitled to absolute immunity").

The NYSE's Opposition to Petition for Writ of Certiorari also seeks to leave the impression that the NYSE did not actively engage in any misconduct, writing that

> the Complaint is devoid of any allegation that the NYSE executed or directed the execution of any improper proprietary trades by the Specialist Firms. Instead, the only means of "active participation" alleged in the Complaint is the NYSE's supposed intentional failure to exercise its regulatory authority to "halt, expose or discipline" the Specialist Firms' misconduct "to the extent necessary to deter, stop or prevent" the misconduct. JA2:72 (Compl. ¶ 5).

NYSE Opposition at 7.

In fact, the Complaint alleges not just passive inaction, but active misconduct as well. For example, it alleges that NYSE officials routinely tipped off Specialists ahead of impending investigations, so that the Specialists could cover the tracks of their improper and illegal conduct. JA2:121-22 (¶116). Indeed, it specifies that Toni-Ann Turco, who had previously worked in the NYSE Division of Market Surveillance, during the Class Period worked as the head of one Specialist Firm's compliance department—where she was tipped off to investigations by the NYSE's Lucy Palmieri. *Id.* Turco often bragged that "it pays to have friends at the Exchange." *Id.*

The Complaint alleges that the NYSE worked with the Specialist Firms to facilitate improper trading by helping to doctor the Specialist Firms' weekly trading reports to create records of fictitious trades and

conceal the improper trading. JA2:123-24 (¶¶120-126). The NYSE did this by flagging the individual specialists' weekly transaction reports containing improper trading, alerting the specialists to the problem, then giving the Specialists the rest of the week to "correct" the reports—allowing them to violate NYSE trading rules, cover up the violations, and escape without any penalty. *Id.*

The NYSE—through Richard Grasso himself—also strongly encouraged the Specialists to engage in "freezing the book" on a regular basis, while the NYSE's public-relations people simultaneously told public investors that "there was no such thing . . . as 'freezing the book.'" JA2:115-17 (¶¶91-98).

The Second Circuit's opinion itself notes Petitioner's

> allegations that the NYSE knowingly permitted, or even actively encouraged, the Specialist Firms to submit doctored or altered regulatory reports to the NYSE and that it alerted the Specialist Firms to impending internal NYSE investigations so that the Firms could conceal evidence of wrongdoing. Lead Plaintiffs' allegations here focus on the NYSE's approach to weekly Form 81 Reports ("Form 81"), which every Specialist Firm was required to submit when it engaged in principal trades. The NYSE floor officials, Lead Plaintiffs claim, permitted their names and badge numbers to be used in preparing false Form 81s, essentially vouching for trades that they knew to be improper or wrong and even when the NYSE discovered a possible falsification, it would send the relevant Form 81 back to the Firm and permit the Form 81 to be resubmitted with the "correct" information. Officials at the Exchange

> also allegedly "tipped off" at least one of the Specialist Firms about an imminent investigation before the official announcement, permitting it, now forewarned, to alter the records to conceal its misconduct.

Petition for a Writ of Certiorari Appendix at 22a-23a. "At first glance, none of these actions appears to fall within the ambit of the powers delegated to the Exchange." *Id.* at 23a.

In sum, Petitioner argued below that this Court's precedents bar the kind of broad absolute immunity granted to the NYSE in this case, and the NYSE was in fact an active participant in the misconduct alleged. The issues presented are important ones, and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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